Supreme Court, U.S.
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No. 99-1506

In the

Supreme Court of the United States

CERIDIAN CORPORATION, a Delaware corporation, individually and as successor in interest to Control Data Corporation,

Petitioner,

vs.

KENT P. BARKER, CARLA J. MCANDREWS and MARTIN J. TIMMONS, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' argument, couched in four parts, boils down to an assertion that *Barker I* (*Barker v. Ceridian Corp.*, 122 F. 3d 628 (8th Cir. 1997)) was decided correctly; that *Barker II* (*Barker v. Ceridian Corp.*, 193 F.3d 976 (8th Cir. 1999)) did not alter *Barker I*; and that, therefore, Petitioner's request for certiorari relates only to routine propositions set out in *Barker I* and is untimely. The argument is premised on fundamental errors.

I. PETITIONERS SEEK REVIEW OF BARKER II'S PER SE RULE

Petitioners seek review of *Barker II*, which created a new rule in the Eighth Circuit. Respondents' argument to the contrary is deeply flawed. *Barker I* differs radically from *Barker II*. *Barker I* was a traditional and close analysis of plan language; *Barker II* is a *per se* ambiguity rule which invites, in every case, a deluge of parole evidence regarding intent to vest welfare benefits. In *Barker I*, the Eighth Circuit stressed that ambiguity was present because a plan termination clause "tempered" or qualified the language of the reservation of rights. *Barker I* at 636-638 (A-82 through A-87). Ceridian demonstrated on remand in *Barker I* that the termination clause did not bear in any way on the reservation of rights clause. The trial court agreed and thus resolved the ambiguity against plaintiffs.[1]

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[1] As to Respondents' argument that *Barker II* was correctly decided on the merits, we note that the experienced District Court judge, after days of trial, numerous witnesses, and dozens of exhibits, held: "all of the testimony heard at trial and all of the exhibits received in evidence show that there was no intent...to create a vested welfare benefit in the form of the premium payment for disabled employees." (A-25). The Appellate

On their appeal in *Barker II*, Respondents were therefore forced to argue either that the trial court's conclusion regarding the termination clause was wrong or retroactively to revise their approach and argue that ambiguity was present solely by virtue of the juxtaposition of the unqualified reservation of rights with the so-called "promise" of continuing benefits. They chose the latter course. The Eighth Circuit agreed, eviscerating *Barker I*'s rationale, and holding, for the first time, that ambiguity was created solely and inherently by the juxtaposition of the two clauses. Thus, *Barker II* created a new *per se* rule of law, far broader than the fact-dependent conclusions of *Barker I* and with implications beyond those of a solitary case. Respondents' only response is that *Barker II* did not use the term *"per se"* and therefore no such rule exists. It is, of course, the irreducible impact of the holding, not the terminology, that is definitive and its implications that merit review. The *Barker II* holding unavoidably requires a finding of ambiguity whenever an unqualified reservation of rights exists in plan documents together with statements regarding continuing benefits. Respondents do not genuinely refute this point.

II. BARKER II REFLECTS SHARP DIVISIONS AMONG THE CIRCUITS

Respondents also attempt to downplay the inconsistencies among the circuits regarding this threshold question of plan interpretation. They argue that the only conflict among the courts is whether "presumptions", rather than rules of construction, should be applied to determine intent to vest welfare benefits. The argument is without merit. The rules of construction and of this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) naturally favor

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Court substituted its own judgment for that of the District Court. *Barker II* was thus not only legally unsound, but incorrectly decided on the facts.

the written document. Circuit courts agree on that proposition in principle, yet depart far from it in practice, as we demonstrated in our opening brief.[2] Indeed, the confusion and inconsistencies continue apace. *Compare DeBoard v. Sunshine Mining and Refining Co.*, 2000 WL350129 (10th Cir., April 5, 2000)(finding ambiguity and vesting where plan provided for ongoing health care and contained a general reservation of rights) *with In Re Sears Retiree Group Life Insurance Litigation*, 2000 WL 335542 (N.D. Ill. March 17, 2000)(finding no ambiguity or vesting where plan provided for continued life insurance benefits and contained a general reservation of rights).

Barker II represents an extreme departure from ERISA principles, encouraging, if not requiring, abandonment of the written documents altogether and in every case where language regarding the right to change a plan coexists with language regarding on-going benefits. If ERISA plans are to be construed as Congress intended and consistently nationwide, this Court's guidance is needed to resolve the conflicts among the courts, reinforce *Firestone*, and reject *Barker II* and similar approaches.

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[2] Respondents' insistence that *Barker I* and *II* are mere applications of *Firestone* is particularly ironic, when *Barker II* so clearly skips an analytical step which *Firestone* requires, namely, that the written instrument as a whole is to be reviewed in order to resolve an ambiguity before extrinsic evidence can properly be examined. *Barker II* rejected use of the Formal Plan document to interpret the SPDs, on a point to which the Formal Plan clearly spoke and the SPDs were silent. *See* Petition at 6, n2 and A-17 to A-18. Applying *Firestone* properly would have required deference to the Formal Plan.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for certiorari.

Dated: April 14, 2000

Respectfully submitted,

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